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No. 91-1749

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

M. HISHAM TARABISHI, M.D.,
Petitioner,

v.

MCALESTER REGIONAL HOSPITAL, also known as MCALESTER REGIONAL HEALTH CENTER AUTHORITY PUBLIC TRUST STATUS, THE MCALESTER CLINIC, INC., LEROY M. MILTON, M.D., GEORGE BROWN, M.D., WILLIAM G. BLANCHARD, M.D., SAMUEL E. DAKIL, M.D., JOHN B. COTTON, M.D., STEVEN ATWOOD, M.D., CHARLES K. HOLLAND, M.D., KARL SAUER, M.D., HERTZL V. SCHAFF, M.D., JOE MCCAULEY, M.D., and DON SCHULLER, M.D.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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QUESTION PRESENTED

The only question presented is whether the court of appeals erred in its fact-bound determination that the plaintiffs below had failed to prove Sherman Act claims based on the district court's factual findings—reached after nine weeks of bench trial—that the plaintiffs failed to adduce evidence sufficient to establish any relevant product or geographic markets, that they failed to present any evidence indicating that respondent Hospital or respondent Clinic had the power to control prices or exclude competition, that they failed to prove a specific intent to monopolize, that they failed to prove any conspiracy intended to reach an illegal goal, and that they failed to show any adverse effect on competition.

RULE 29.1 DISCLOSURE

The McAlester Clinic, Inc. has neither a parent company nor any non-wholly owned subsidiaries.

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MCALESTER REGIONAL HOSPITAL, also known as MCALESTER REGIONAL HEALTH CENTER AUTHORITY PUBLIC TRUST STATUS, THE MCALESTER CLINIC, INC., LEROY M. MILTON, M.D., GEORGE BROWN, M.D., WILLIAM G. BLANCHARD, M.D., SAMUEL E. DAKIL, M.D., JOHN B. COTTON, M.D., STEVEN ATWOOD, M.D., CHARLES K. HOLLAND, M.D., KARL SAUER, M.D., HERTZL V. SCHAFF, M.D., JOE MCCAULEY, M.D., and DON SCHULLER, M.D.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents McAlester Regional Hospital a/k/a McAlester Regional Health Center Public Trust Status ("the Hospital"), McAlester Clinic, Inc. ("the Clinic"), Leroy M. Milton, M.D., George Brown, M.D., William G. Blanchard, M.D., Samuel E. Dakil, M.D., John B. Cotton, M.D., Steven Atwood, M.D., Charles K. Holland, M.D., Karl Sauer, M.D., Hertzl V. Schaff, M.D., Joe McCauley,

M.D., and Don Schuller, M.D. hereby oppose the petition for a writ of certiorari filed by M. Hisham Tarabishi, M.D. in this case.

STATEMENT OF THE CASE

This case involves a garden-variety, fact-bound antitrust dispute in which plaintiffs,[1] during nine weeks of trial, were unable to adduce evidence sufficient to prove even the most fundamental elements of the Sherman Act Section One and Two claims that they asserted. A statement of prior events in the case may be found in the introductory portions of the court of appeals' opinion (Pet. App. 5-10), to which respondents refer the Court.

Petitioner's Statement of the Case contains some inaccuracies that should be corrected, the most significant of which is petitioner's repeated suggestion that this case involves more than just antitrust issues and indeed that a central question is whether petitioner was deprived of a property right in violation of the due process clause of the Fourteenth Amendment.[2] As the district court emphasized, "[t]he only issue in this trial was whether defendants committed antitrust violations." Pet. App. 74. In fact, no constitutional or statutorily-derived "due process" rights were part of the complaint or of any cause of action alleged in this suit.

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[1] Plaintiffs were Dr. Tarabishi and M. Hisham Tarabishi, Inc. ("the TMD Center"). It is interesting to note that only Dr. Tarabishi has petitioned for a writ of certiorari. Thus, this matter involves only the complaint of a single physician regarding his loss of medical staff privileges. The claims of the TMD Center obviously are waived.

[2] Respondents have an honest doubt as to whether counsel of record for petitioner has actually read the voluminous trial transcript. Reading the transcript plainly reveals that this case was tried as it was pleaded—as an antitrust case alone, not a civil rights case.

Thus, petitioner is mistaken when he asserts that the district court "found that procedural due process had not been accorded Tarabishi . . . ." Pet. 5. To be sure, the district court made clear its displeasure at the manner in which Dr. Tarabishi's peer review had been conducted, but it did not place that displeasure in a constitutional due process framework and it certainly did not enter a "finding" that constitutional due process standards had been violated. To the contrary, the district court made a point of concluding its discussion of the perceived flaws in the peer review process with a reminder of what the case was really about: "The issue, however, is whether [the peer review proceedings] constitute an antitrust violation." Pet. App. 72.[3]

In the same vein, petitioner misleadingly states that the court of appeals "affirmed the judgment of the District Court on antitrust grounds" (Pet. 6)—as if other potential grounds existed.

Petitioner's last-minute attempt to inject new issues into this case would be frivolous in any event, but it is particularly so given that Dr. Tarabishi has already aired his peer review due process grievances in separate litigation, a fact that he never bothers to mention.[4] Respondents would refer the Court to *Tarabishi v. McAlester Regional Hospital*, 827 F.2d 648 (10th Cir. 1987) for a description of that litigation. In particular, respondents would refer the Court to page 650 in the court of appeals' opinion, wherein the court sets forth the claims made by Dr. Tarabishi in that case, including his claim that defendants were liable "for violation of

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[3] Petitioner's desire to direct this case away from the antitrust grounds on which it was decided—even at the risk of misleading the Court—is nowhere more evident than in his decision to exclude this critical sentence from the lengthy quotation of the district court's findings and conclusions, set forth at page 6 of the petition.

[4] In the circumstances, respondents submit that an award against petitioner under Sup. Ct. R. 42.2 would be appropriate.

plaintiff's civil rights under 42 U.S.C. § 1983, by denying the plaintiff due process and the revocation of plaintiff's hospital staff privileges."

Other inaccuracies may be found in petitioner's Statement of the Case. Petitioner states as a matter of fact that "[t]he loss of [hospital staff] privileges caused the [TMD] Center to collapse." Pet. 4. The district court made no such finding, and the court of appeals noted that a dispute exists as to the reasons for the failure of the TMD Center. Pet. App. 9. Petitioner also states that the TMD Center "would have been a force in lowering surgical prices and reducing unnecessary health services." Pet. 5. This statement has no basis in the factual findings in this case.[5]

Finally, the Statement of the Case suggests that the court of appeals, in note 14 of its opinion, concluded that judicial scrutiny of peer review proceedings (in-

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[5] Petitioner's argument contains additional unsupported factual assertions, including his discourse on peer review in the United States (Pet. 10-12) and his contention that the Army rejected Dr. Tarabishi because of the peer review of which he complains. *Id.* 12.

The argument also contains the demonstrably false assertions that the district court "specifically found that the peer review actions were not taken "[i]n the reasonable belief that the action was in the futherance of quality health care," (Pet. 16, *quoting* 42 U.S.C. § 11112(a)(1)) and that the court found "that the peer review actions against Dr. Tarabishi were a sham,' the purpose of which was "to further the Respondents' own economic motives." *Id.* 27. While the district court did not like the manner in which the peer review had been conducted, it certainly did not make the findings dreamed up by petitioner. This is a significant error on petitioner's part, because his Question Presented assumes that the courts below did find that the peer review was a sham. The question raised by petitioner, therefore, is a hypothetical abstraction, the answer to which would not aid in the determination of this case. Such a question is not worthy of certiorari. *Thorpe v. Housing Authority of Durham*, 393 U.S. 268, 284 (1969); *Busby v. Electric Utilities Employees Union*, 323 U.S. 72, 75 (1944); *Lowden v. Northwestern Nat. Bank & Trust Co.*, 298 U.S. 160, 162 (1936); *United States v. Mayer*, 235 U.S. 55, 66 (1914).

cluding Dr. Tarabishi's) should be precluded on public policy grounds. This supposed conclusion, petitioner argues, demonstrates that the court of appeals ignored the district court's concerns with the manner in which Dr. Tarabishi's peer review had been conducted. Pet. 7.

Petitioner is doubly wrong. First, it is quite obvious that the public policy concern expressed by the court of appeals involved the essential facilities doctrine, not peer review: the court indicated a degree of reluctance to apply the essential facilities doctrine to *any* hospital staff privileges decision, *regardless* of whether peer review was involved.[6] Nothing in the court's opinion purports "to exempt peer review proceedings from the application of the antitrust laws" as petitioner suggests. Pet. 23.[7]

Second, there is nothing to suggest that the court of appeals simply "ignored" the specifics of Dr. Tarabishi's peer review; rather, it is fair to assume that the court did not dwell on that issue because it was evident to the court—as it had been to the district court—that plaintiffs had not proven an *antitrust* violation notwithstanding the manner in which Dr. Tarabishi's peer review had been conducted. Antitrust claims have their own ele-

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[6] Indeed, peer review was not even involved in *Castelli v. Meadville Medical Center*, 702 F. Supp. 1201 (W.D. Pa. 1988), *aff'd*, 872 F.2d 411 (3d Cir. 1989), cited by the court of appeals in footnote 14. Dr. Castelli's inability to obtain staff privileges resulted from the hospital's implementation of an exclusive contract with another doctor, not unfavorable peer review.

After expressing doubt as to the applicability of the essential facilities doctrine in this case, the court of appeals went on to state that even if the case were tested under the doctrine, no liability would be found because petitioner had failed to prove that the Hospital was a monopoly. Pet. App. 24 n.14.

[7] Petitioner's misreading of the court of appeals' opinion provides the basis for the straw man argument set forth at pages 23-25 of the petition and for some of the rhetorical questions contained in the petition's Conclusion.

ments and standards, apart from any hypothetical "due process" issues. The court of appeals kept its focus on the antitrust issues that were present, rather than chase after Fourteenth Amendment issues that were not in the complaint at the time of trial, that were not briefed to the district court, that were not assigned as error to the court of appeals, and that were not germane to the disposition of the case.

REASONS FOR DENYING THE PETITION

Respondents demonstrate below that petitioner has not stated any "special and important reasons" [8] why the Court should review this case. There is no conflict between the court of appeals' decision and decisions of this Court or other appellate courts; the facts of this case provide a basis neither for reconciling conflicts in the courts nor for establishing standards of any general interest or application. Resolution of this case turned on specific antitrust-related factual determinations made by the district court after an exhaustive presentation by plaintiffs.

In addition, petitioner's central contention—that he was denied due process under the Fourteenth Amendment—was not raised at trial nor as a point of error in the court of appeals, and it is not relevant in this antitrust case.

Finally, the decisions below were fully consistent with established antitrust jurisprudence, while the theory asserted by petitioner has no basis in precedent and is contrary to basic premises underlying the Sherman Act. For these reasons, the petition for a writ of certiorari should be denied.

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[8] Sup. Ct. R. 10.1.

I. THIS IS A FACT-BOUND CASE THAT PRESENTS NO ISSUE WORTHY OF THE ATTENTION OF THE COURT

Petitioner's application for certiorari is little more than an extended (and often misguided) discourse on the supposed incorrectness of the decisions below. Petitioner says much about the supposed merits of his position, but he says very little about why this Court should become involved in the first place.

Petitioner points to no conflict whatsoever among the circuits on any of the issues that (purportedly) are contained in this case. He makes a feeble attempt at arguing that the court of appeals' decision conflicts with this Court's decisions in *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963) and *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986), but as shown below *Silver* is distinguishable on its facts [9] and petitioner's citation to *Indiana Federation* is simply a demonstration of his failure to acknowledge basic antitrust concepts.[10]

According to petitioner, the principal basis for certiorari is the need for the Court to "establish a uniform standard to deal with" persons in the medical profession who, when they engage in peer review, do not comply with the criteria set forth in the Health Care Quality Improvement Act of 1986, 42 U.S.C. §§ 11101 *et seq.* ("HCQIA"). Pet. 28. However, this is certainly not the case in which to set such a standard, if indeed one is even necessary,[11]

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[9] *See infra* at 13-15.

[10] *See infra* at 16 n.23.

[11] This Court has consistently rejected petitions for certiorari in cases involving peer review and due process concerns. *See Feldman v. Glucroft*, 112 S. Ct. 1560 (1992); *Caine v. Hardy*, 112 S. Ct. 1474 (1992); *Cardwell v. Rockford Memorial Hospital*, 111 S. Ct. 556

given that *this case was not, and could not have been, decided under the HCQIA.* The district court held that the HCQIA was inapplicable to this case because the law applies only to peer review actions commenced *on or after November 14, 1986*; Dr. Tarabishi's peer review occurred years earlier. Pet. 4; Pet. App. 70. The Court should not grant certiorari to establish a standard that could not conceivably be of any importance in the particular case before the Court. *See The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959).

Remarkably, petitioner also tells the Court that "there may not ever be a better case, *factually*, from which this Court can determine the antitrust consequences flowing from a decision by a group of medical doctors to subvert the peer review process for the purpose of eliminating a competitor . . . ." Pet. 29 (emphasis in original). It is difficult to see how this is so, given that the courts below did not find that the peer review participants acted with such a purpose. Moreover, federal standards for medical peer review were established by Congress *after* the events of which petitioner complained. It would be a waste of the Court's time to set "standards" that would be obsolete the day they were announced.

It is evident that the decisions below were entirely uncontroversial and were based on the specific facts of this case—in particular, plaintiffs' failure to prove their markets. Such a case does not merit review by this Court.

II. PETITIONER'S FOURTEENTH AMENDMENT ISSUE WAS NEITHER RAISED IN NOR DECIDED BY THE COURT OF APPEALS

Among the failures of proof noted by the courts below were plaintiffs' failure to prove the relevant product market, their failure to prove the relevant geographic market,

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(1990); *Knapp v. Palos Community Hospital*, 493 U.S. 847 (1989); *Toussaint v. Laurens County Health Care System*, 489 U.S. 1014 (1989); *Gill v. Mercy Hospital*, 488 U.S. 892 (1988).

their failure to prove an adverse effect on competition, their failure to prove that the Hospital or the Clinic had the power to control prices or to exclude competition, and their failure to prove that defendants possessed a specific intent to monopolize.

Faced with these irreparable factual flaws in the case, petitioner spends a substantial part of his petition avoiding the law of antitrust altogether. Searching for something worthy of this Court's attention—something other than fact-bound determinations that he simply failed to adduce sufficient evidence to prove his antitrust claims—petitioner strives to change this case from an antitrust case to a Fourteenth Amendment due process case. Indeed, the centerpiece of petitioner's entire argument now appears to be a supposed violation *not* of the Sherman Act but of the Constitution: all theories of recovery suddenly flow from the proposition that "petitioners [sic] [12] have been deprived of a valuable property right in violation of the due process clause of the Fourteenth Amendment." Pet. 7. Concepts such as markets and intent to monopolize and power to exclude competition have now given way to discussions of whether causes of action are "species of property" (*id.* 8), of the proper balance to be struck between private and governmental interests (*id.* 9), and of the relative merits of strict and intermediate scrutiny. *Id.*

Neither the district court nor the court of appeals had the benefit of petitioner's exposition on the centrality of the Fourteenth Amendment to this case. Indeed, the Statement of the Issues in petitioner's opening appeal brief made no mention whatsoever of the due process issues that he now finds to be crucial. In fact, neither petitioner's opening brief nor his reply brief even *cited* the Fourteenth Amendment. Naturally, therefore, the court of appeals did not address the question of whether

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[12] As noted above, there is only one petitioner in this case: Dr. Tarabishi.

petitioner had been deprived of a property right in violation of the due process clause.

The general rule is that this Court does not decide questions that were not raised or resolved in the lower court.[13] The rule need not be followed in exceptional cases, *see Youakim v. Miller*, 425 U.S. 231, 234 (1976), but there is nothing to indicate that this is such a case. If anything, there is an especially strong reason for *not* granting an exception to the rule in this case because, as mentioned above, the due process issues that petitioner wishes to raise here have already been adjudicated in separate federal litigation involving precisely the same events. This Court should not expend its resources considering an issue that (1) was not relevant to the disposition of the case, (2) was not assigned as an error before the court of appeals, and (3) was addressed in a separate proceeding.

III. PETITIONER CAN FIND NO FAULT WITH THE DECISION OF THE COURT OF APPEALS

Even if petitioner had preserved his Fourteenth Amendment "issue," his attempt to merge due process concerns into the antitrust law would still be wholly without merit and thus an inappropriate basis upon which to grant the petition.

Entirely disregarding the Court's admonition that "the absence of procedural safeguards can in no sense determine the antitrust analysis" in cases such as this, *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 293 (1985),[14] petitioner would

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[13] *See, e.g., Air Courier Conference v. American Postal Workers Union*, 111 S. Ct. 913, 917 (1991); *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 195 n.2 (1989); *Rogers v. Lodge*, 458 U.S. 613, 628 n.10 (1982); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *Sonzinsky v. United States*, 300 U.S. 506, 514 (1937).

[14] The Court in *Northwest Wholesale Stationers* added that "[i]f the challenged action would not amount to a violation of § 1, no lack

not only make the deprivation of due process an element of an antitrust claim but indeed he would turn it into an antitrust trump card—prove the absence of procedural safeguards and proceed directly to *per se* liability under the Sherman Act. Market definition, competitive impact, market power, and other such traditional antitrust concepts would appear to be irrelevant under petitioner's theory.

Petitioner would filter his Fourteenth Amendment-Sherman Act mixture through the HCQIA. The set of standards contained therein would be much more than just a tool for determining whether participants in peer review were entitled to immunity; under petitioner's theory, those standards would become the very means with which to test whether a *per se* violation of the Sherman Act had occurred. The middle ground would disappear: one who failed to qualify for immunity under the HCQIA would automatically be guilty under the Sherman Act.

This certainly would simplify things, but it is hard to find any other merit in petitioner's suggestions. Not only does petitioner's theory completely ignore the lesson of *Northwest Wholesale Stationers*,[15] it also ignores the basis upon which the *per se* rule is applied in the first place. The *per se* rule of presumptive illegality applies only after sufficient judicial experience with a given form of conduct has led to the conclusion that the conduct tends inherently to be anticompetitive and to possess no re-

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of procedural protections would convert it into a *per se* violation because the antitrust laws do not themselves impose on joint ventures a requirement of process." 472 U.S. at 293. Because a determination on the due process issue would not aid in the disposition of this case, petitioner's due process contentions are immaterial and unworthy of certiorari. *See supra* at note 5.

[15] Indeed, petitioner's reasoning—and his reading of *Silver*—is similar to that employed by the Ninth Circuit in *Northwest Wholesale Stationers* and subsequently rejected by this Court. *See Northwest Wholesale Stationers*, 472 U.S. at 291-93.

deeming values—for example, price fixing agreements among competitors.[16] Petitioner cannot point to any accumulated body of judicial experience indicating that physician peer review—procedurally flawed or not—is so pernicious and inherently anticompetitive as to be presumptively illegal under the Sherman Act.[17] To the contrary, consider the lesson taught by this very case: the courts below found that the peer review here at issue, flawed though it may have been, *still did not cause any harm to competition.* It would indeed be ironic if this were the case in which *per se* treatment were extended to physician peer review.

The illogic of petitioner's argument is thus apparent: he seeks retroactively to invoke the *per se* rule—which applies only where it is fair to assume that an antitrust violation has occurred—in a case where an exhaustive rule

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[16] *See Northwest Wholesale Stationers*, 472 U.S. at 289. The Court has been quite cautious in extending the *per se* rule; indeed, recent cases suggest that the rule is being contracted rather than expanded. *See, e.g., Northwest Wholesale Stationers; Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

[17] The courts have found peer review to be vital in the effort to protect patients from unqualified doctors and thus have consistently applied the rule of reason in antitrust cases in which such conduct is at issue. *See Oksanen v. Page Memorial Hospital*, 945 F.2d 696, 708-09 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 973 (1992); *Nanavati v. Burdette Tomlin Memorial Hospital*, 857 F.2d 96, 121 n.24 (3d Cir. 1988), *cert. denied*, 489 U.S. 1078 (1989); *Miller v. Indiana Hospital*, 843 F.2d 139, 144 (3d Cir.), *cert. denied*, 488 U.S. 870 (1988); *Goss v. Memorial Hospital System*, 789 F.2d 353, 355-56 (5th Cir. 1986); *Brown v. Our Lady of Lourdes Medical Center*, 767 F. Supp. 618, 628 (D.N.J. 1991); *Boczar v. Manatee Hospitals and Health Systems, Inc.*, 731 F. Supp. 1042, 1046 (M.D. Fla. 1990); *Loiterman v. Antani*, 1990 U.S. Dist. LEXIS 7955 (N.D. Ill. 1990); *Friedman v. Delaware County Memorial Hospital*, 672 F. Supp. 171, 190 (E.D. Pa. 1987), *aff'd*, 849 F.2d 600 (3d Cir. 1988); *Wright v. Southern Mono Hospital Dist.*, 631 F. Supp. 1294, 1322 (E.D. Cal. 1986), *aff'd sub nom. Stehlik v. Southern Mono Hospital Dist.*, 924 F.2d 1063 (9th Cir. 1991); *Pontius v. Children's Hospital*, 552 F. Supp. 1352, 1366-78 (W.D. Pa. 1982).

of reason analysis has already been conducted and has uncovered *no antitrust violation whatsoever*. Petitioner's demonstrated inability to prove that any defendant had engaged in any antitrust violation would be forgotten and forgiven—antitrust liability would be imposed on defendants anyway, simply because the case could be stuffed into some *per se* pigeonhole. It is precisely this sort of mindless substitution of labels for substance that the Court rejected in *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 458 (1986) and *Northwest Wholesale Stationers*.[18] The *per se* rule assumes that evidence of an antitrust violation *could* be adduced if such were required; obviously, the rule should not be applied in an instance in which it has been conclusively determined that such evidence does *not* exist.[19]

This absence of proof renders irrelevant petitioner's discussion of *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963). In *Silver* there *was* evidence sufficient to establish the elements of an antitrust violation—a group boycott—and the only question was whether the defendants were nonetheless entitled to an exemption from antitrust liability under the Securities Exchange Act. Because the Court believed that the Securities Exchange Act did not provide such an exemption, *and because the elements of an antitrust violation were other-*

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[18] 472 U.S. at 293-98. Indeed, one of the bases for the Court's rejection of the *per se* rule in *Northwest Wholesale Stationers* was the fact that the district court, applying the rule of reason, had found no anticompetitive impact. The Court concluded that the evidence before it was insufficient to support an inference that the conduct at issue was inherently anticompetitive and thus presumptively illegal. *Id.* at 296-97 & n.8.

[19] In addition, the Court in *Northwest Wholesale Stationers* held that the *per se* rule does not apply in cases such as this absent a showing that the defendants possess market power or exclusive access to an element essential to effective competition. 472 U.S. at 296. Because petitioner could not prove the relevant markets, he obviously could not and did not make such a showing.

wise present,[20] defendants were liable. Here, on the other

[20] The Court noted that "[t]he point is not that the antitrust laws impose the requirement of notice and a hearing here, but rather that, in acting without according petitioners these safeguards in response to their request, the Exchange has plainly exceeded the scope of its authority under the Securities Exchange Act to engage in self-regulation and therefore has not even reached the threshold of justification under that statute *for what would otherwise be an antitrust violation.*" 373 U.S. at 364-65 (emphasis added). Thus the Court did not make the "no immunity equals liability" leap urged by petitioner here: the Court looked for (and found) the elements of an antitrust violation independent of its inquiry into whether the conduct at issue was exempt from scrutiny. *See id.* at 347 (conduct at issue was "concerted action" constituting "a group boycott depriving petitioners of a valuable business service which they needed in order to compete . . . .").

The dissent in *Silver* was concerned that the Court *had* moved too quickly from the no-exemption determination to a finding of liability. Although that concern appears not to have been well founded, given that the Court made certain that an antitrust violation had in fact been made out, it is nonetheless interesting to note the dissent's views on the impropriety of proceeding in the manner suggested by petitioner here:

> The Court says that because of the failure to accord "procedural safeguards" to the petitioners, the respondent Exchange is *ipso facto* liable to them under the antitrust laws. This means that a bucket-shop operator who had been engaged in swindling the public could collect treble damages from a stock exchange which had denied him its wire connections without first according him notice and a hearing. For, as I understand the Court's opinion, the exchange would not be allowed to prove in this hypothetical antitrust case that the plaintiff *was* such a swindler . . . . This result seems to me completely to frustrate the purpose and policy of the Securities Exchange Act, and to bear no relevance to the purpose and policy of the antitrust laws. Even assuming that Congress agreed with the Court's notions of the appropriate procedures under the Exchange Act, I cannot believe that Congress would have provided an antitrust forum and private treble damage liability to enforce them.
>
> Whether there has been a violation of the antitrust laws depends not at all upon whether or not the defendants' conduct was arbitrary. . . .

Id. at 369-70 (emphasis in original). As stated above, the Court expressed a similar view in *Northwest Wholesale Stationers*. *See supra* at note 14.

hand, the elements of an antitrust violation are *not* otherwise present: the courts below found that plaintiffs failed to prove the elements of any of their antitrust claims. Thus it will not do for petitioner to attempt to concoct a conflict between *Silver* and the court of appeals' decision by saying that "[p]rocedural safeguards are a prerequisite to the validity of self-regulatory refusals to deal, and that principle was recognized in *Silver*" (Pet. 21) or that *Silver* "allow[s] the application of the rule of reason to concerted refusals to deal" only in certain circumstances (*id.* 25): in this case, unlike *Silver*, *no* refusal to deal (or boycott or conspiracy [21] or intent to monopolize or relevant market or anything else from which an antitrust violation is made) was proven in the first place.[22] Exemptions and immunities and failures to qualify therefor are irrelevant where there is no offense to begin with.

The response to petitioner's final contention—that "this cause should be considered under the rule of reason" (Pet. 26)—is that it already has been, twice. Petitioner's contentions have been given a thorough review under the rule of reason and have been found, after nine weeks of trial, to be factually insufficient. Petitioner's failure to prove his markets doomed his case under the rule of

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[21] The only joint action found in this case was the peer review itself. This raises the only interesting question that could come out of this case: can a Section One "structural conspiracy" be derived from peer review activities? While this issue has been the subject of some debate in the courts of appeals, the Court recently rejected a petition for certiorari that presented the question. *Okansen v. Page Memorial Hospital*, 112 S. Ct. 973 (1992). Here, even if peer review might provide the "agreement" component of a Section One case through the "structural conspiracy" theory, petitioner would still have failed to prove at trial *any* of the other requisites of a Section One rule of reason case.

[22] As the Court stated in *Northwest Wholesale Stationers*, the question is not whether procedural protections were provided but "whether the decision to expel . . . is properly viewed as a group boycott or concerted refusal to deal . . . ." 472 U.S. at 293.

reason: petitioner may *say* that the TMD Center was the Hospital's "only outpatient surgery competition" (*id.* 26), and that the Hospital's prices were "artificially high" (*id.* 27), and that "the anticompetitive character of the restraint . . . is obvious" (*id.*), but it was his burden to provide a competitive context in which to measure the accuracy of such statements. The courts below determined that petitioner had *not* proven these points in any fashion that required the intervention of federal antitrust law. This being so, there simply is no issue worthy of certiorari in this case.[23]

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[23] Petitioner's rule of reason argument is an indication of his failure to grasp basic antitrust concepts. For example, petitioner tries to devise a conflict between the court of appeals' decision and *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986), by asserting that the court of appeals incorrectly failed to apply *Indiana Federation's* "obvious injury to competition" test. Pet. 27. Petitioner contends that "the anticompetitive character of the restraint defendants have imposed here is obvious" (*id.*) simply because he was excluded from the hospital; he says that the revocation of his staff privileges "limited consumer choice" and he is pleased to point out that the court of appeals "observed . . . that a hospital's use of the peer review process to eliminate a physician 'always, in some sense, reduces competition.'" *Id.* What petitioner fails to understand, of course, is that the question is not whether competition has been restrained: the question is whether competition has been *unreasonably* restrained. *See Northwest Wholesale Stationers*, 472 U.S. at 289; Pet. App. 26 n.15. Petitioner did not make such a showing.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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